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CONCORD, N.H.

Honorable W. Douglas Scammon
House of Representatives
State House
Concord, New Hampshire

Dear Mr. Scammon:

Following our conversation yesterday I looked into the question whether a person who had been compensated in part by an insurance company under an Automobile Physical Damage Policy for damages sustained when his car was struck by a national guard vehicle must, under the subrogation clause of his policy, pay over to the insurer such sum as the Legislature may by special act award him in an attempt to make him entirely whole, such sum being the difference between his total loss and the amount paid him by the insurer. I am convinced that he is under no such obligation.

I am advised by the Insurance Commissioner that the standard form of Automobile Physical Damage Policy contains the following clause relating to subrogation:

"In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

At least one insurance company, Allstate Insurance Company, also uses a variation of the foregoing:

"Upon payment of the loss, Allstate shall succeed to all the insured's rights of recovery therefor and the insured shall do whatever is necessary to secure such rights and do nothing after loss to prejudice them."

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It will be noted that what the insured assigns, and what the subrogee acquires, is the "insured's rights of recovery." (Emphasis supplied)

It is a well settled principle of law that the State is not liable for torts or wrongs committed by it or its agents. In the Restatement of the Law of Torts, s. 887, the rule is stated in the negative:

"No one, except the State, has complete immunity from liability in tort."

In 49 American Jurisprudence, States, Etc., s. 76:

"The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortious acts or conduct of any of its officers, agents or servants, committed in the performance of their duties. . . .

"While there is authority to the contrary, the general rule is that the exemption of the state from liability for torts of its officers and agents does not depend upon the state's immunity from suit without its consent, but rests upon grounds of public policy which deny the liability of the state for such damages."

When a citizen who has been damaged by the negligent act of an agent or servant of the State comes before the Legislature with a request that he be made whole for his loss, he is not asserting a right. He is a petitioner praying relief through an act of grace on the part of the State. If he had a right, he would be in court, since it is the judiciary, not the legislature, which concerns itself with the adjudication of rights.

The State is not liable for the damages sustained by the petitioner; it need give him neither notice, nor hearing, nor consideration of any kind with respect to his petition. But it may reimburse him if it will, simply, again, as an act of grace. In making such payment the State is purely a volunteer. As respects the injured person and his subrogee, the situation is entirely as if a disinterested third person impelled by philanthropic motives undertook to make up to the injured person the difference between his total loss and the reimbursement made by the insurer.

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In such circumstances, the payment made by the State could not be considered to have been made pursuant to any of the insured's rights to which the insurer was subrogated by the policy.

Very truly yours,

Warren E. Waters
Deputy Attorney General

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